2001

Lulu Black v. V. Pershing Nelson, Ralph L. Smith, Gladys Smith, Gladys' Beauty Salon : Brief of Respondent

Utah Supreme Court

IN THE

SUPREME COURT

OF THE

STATE OF UTAH

LULU BLACK,
Plaintiff-Appellant,

vs.

V. PERSHING NELSON,
RALPH L. SMITH and
GLADYS SMITH, d/b/a
GLADYS' BEAUTY SALON,
Defendants-Respondents.

Case No.
13470

BRIEF OF RESPONDENTS SMITH

Appeal from the Judgment of the Fourth Judicial District Court in and for Utah County, State of Utah, Honorable George E. Ballif, Judge.

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TABLE OF CONTENTS

Cases Cited

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NATURE OF CASE

This is an action to recover for personal injuries sustained when plaintiff fell down a flight of stairs on premises owned by the defendant Nelson and leased in part to the defendants Smith.

DISPOSITION IN LOWER COURT

At the conclusion of all of the evidence, the trial court granted the respective motions of both defendants for directed verdicts in their behalf.

> The trial judge stated, " . . . it will be my ruling on the motions that because of the fact based on the plaintiff's own testimony, that as she opened the door and light went into the corridor into which she was going sufficient to enable her to see all that was there, but the fact that she did not look directly ahead of her, but only to the left or to the south, as she put it, looking only to and identifying the door into Gladys' Shop, and the further fact that without having made full observations that would have disclosed to her what was in front of her and in the direction into which she was going, and after the door closed behind her she proceeded in such a dark area constituted contributory negligence as a matter of law." (T. 406, 14-26)

RELIEF SOUGHT ON APPEAL

Defendants Smith seek affirmance of the judgment of dismissal entered by the trial court in their favor.

STATEMENT OF FACTS

In addition to the facts set forth by the plaintiff and respondent Nelson, respondents Smith call attention to the following facts:

Defendants Smiths' Exhibit No. 25, a scale diagram of the landing, together with the adjoining doorways and stairway, shows the following:

a. The hallway or landing area is 5 feet wide and 10 feet long to the first stair riser.

b. The door on the outside entry is a 4 foot wide door.

c. When Mrs. Black opened the outside door to the landing the landing was light enough that she could see. (T. 302) Mrs. Black did not look immediately to the west or in front of her. (T. 302)

ARGUMENT

POINT I

PLAINTIFF'S CONDUCT CONSTITUTED NEGLIGENCE AS A MATTER OF LAW.

Respondents Smith contend that on plaintiffs' own testimony the record discloses, as the Court stated,

> " . . . as she opended the door and light went into the corridor into which she was going sufficient to enable her to see all that was there, but the fact that she did not look directly ahead of her, but only to the left or to the south, as she put it, looking only to and identifying the door into Gladys' Shop, and the further fact that without having made full observations that would have disclosed to her what was in front of her and in the direction into which she was going, and after the door closed behind her she preceeded in such a dark area constituted contributory negligence as a matter of law." (T. 406)

This case seems to fall within the rule of law an-

nounced in *Whiteman vs. W. T. Grant Company,* 16 Utah 2nd 81 or 395 P.2nd, 918 (1946).

The Court in the Whiteman case stated the following:

> "The plaintiff is confronted with the basic proposition that when there is a hazard which is plainly visible, ordinarily one is charged with the duty of seeing and avoiding it. And if he fails to do so it is concluded that he was negligent either in failing to look, or in failing to heed what he saw." (395 P2nd 920)

The Court further stated:

> "In order to justify holding that a jury question as to negligence exists, where injury has resulted from an observable hazard, it is essential that there be something which could be regarded as tending to distract the plaintiff's attention or to prevent him from seeing the danger, thus providing some reasonable basis for a finding that even though he exercised due care, he could be excused from seeing and avoiding it." (395 P2nd, 920)

CONCLUSION

The trial Court correctly granted defendants respective motions for a directed verdict at the conclusion of all of the evidence since the evidence, taken in the light most favorable to the plaintiff, which was her own testimony, was that when she opened the rear exterior door, the area inside was so well illuminated that she

was unaware that the artificial light was on, yet she failed to see what was to be seen. After she opened the exterior door approximately half way and was less than 7 feet from the stairway which was directly ahead of her, she failed to observe what was to be seen.

WHEREFORE, defendants Smith respectfully pray that the trial Court's judgment of dismissal as to them be affirmed and that they be awarded their costs herein.

Respectfully submitted this 16th day of July, 1974.

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MAILING CERTIFICATE

I hereby certify that two (2) copies of this brief were mailed, postage prepaid, to Jackson Howard, Attorney for Plaintiff-Appellant, 120 East 300 North, Provo, Utah 84601 and to H. Wayne Wadsworth, Attorney for Respondent Nelson, 702 Kearns Building, Salt Lake City, Utah 84101 this 16th day of July, 1974.

Ray H. Ivie

Attorneys for Respondent-Defendants Smith